WISCONSIN SUPREME COURT
Tuesday, February 11, 2003
1:45 p.m.

01-3128 Conley Publishing Group Ltd. et al. v. Journal Communications Inc. and Journal Sentinel Inc.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). This means that the Court of Appeals, rather than issuing its own ruling, asked the Wisconsin Supreme Court to take the case directly. The Court of Appeals certifies cases that cannot be decided by applying current Wisconsin law. The Supreme Court is the state's law-developing court while the Court of Appeals is responsible for correcting errors that occur in the trial court. This case originated in Waukesha County Circuit Court, Judge Donald J. Hassin presiding.

This is an antitrust case that involves a battle between two newspaper companies for readers in Waukesha County. Conley Publishing Group, which publishes *The* [Waukesha] *Freeman* daily newspaper, filed a claim against Journal Communications Inc., which publishes the *Milwaukee Journal Sentinel*, alleging that Journal Communications tried to monopolize the market for newspaper readership in Waukesha County in violation of Wisconsin's antitrust law.[1]

Here is the background: *The Freeman* was established in 1859 and has been owned by Conley since 1997. It circulates in Waukesha County Monday-Saturday and does not publish on Sunday. The *Journal Sentinel* also circulates in Waukesha County and publishes seven days a week; it controls about 78 percent of the daily newspaper readership market in the county while *The Freeman* controls roughly 22 percent.

In mid-1996, according to *The Freeman*, the *Journal Sentinel* began targeting *Freeman* subscribers by offering a conversion program to Sunday-only *Journal Sentinel* subscribers to get them to take the *Journal Sentinel* every day of the week at no additional cost provided they shortened the length of their Sunday subscription terms. For example, a 52-week Sunday-only subscriber could receive 49 weeks of the daily *Journal Sentinel* at no additional cost if the subscriber shortened the Sunday subscription to 49 weeks as well. The *Journal Sentinel*'s 1997 Marketing Plan expressly stated its plan to "target non-subscribers within [Waukesha] zip codes 53183, 53186, and 53188, which will include the majority of remaining Freeman subscribers."

In Waukesha County Circuit Court, *The Freeman* submitted an affidavit that summarized its circulation from 1996-present. According to the affidavit, for about 10 years prior to 1996, *The Freeman* had about 22,000 subscribers. At the beginning of 1996, it had 21,424 subscribers and by the end of 1997 that had declined to 17,466. During 1998 – the only year that the *Journal Sentinel* did not offer the conversion

[1] Wis. Stats. 133.03. Modeled on the federal Sherman Anti-Trust Act, this law provides, in part, that: "Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce may be fined not more than $100,000 if a corporation, or, if any other person, may be fined not more than $50,000 or imprisoned for not more than 7 years and 6 months or both.

program – *The Freeman* gained subscribers. Today, *The Freeman* has about 15,900 subscribers.

The newspaper's decline in readership has resulted in diminished advertising revenue. *The Freeman* says it has lost about $1.1 million since 1997.

The Freeman argued in the circuit court that the *Journal Sentinel* is taking a loss to supply free daily newspapers to Waukesha County residents as part of a plan to drive *The Freeman* out of business so that they can establish a monopoly in Waukesha County and hike prices to recoup their investment. The *Journal Sentinel*, however, argued that there could be any number of reasons that *The Freeman*'s circulation is shrinking, including a decline nationwide in afternoon newspaper readership, *The Freeman*'s increased subscription prices and reduced number of discounts, and the turnover of senior management when Conley purchased the paper. The judge ultimately found that *The Freeman* had failed to provide sufficient evidence that the *Journal Sentinel* was responsible for its loss, and he dismissed the claim.

It has become more difficult in recent years to prove a predatory pricing claim. Until 1993, predatory pricing could be shown by demonstrating that the competitor was selling the product below cost; however, a 1993 U.S. Supreme Court decision added a requirement that the plaintiff also show that the company offering the discounted product has a reasonable prospect of recouping that loss through an eventual rise in prices above a competitive level.[2] Adding the recoupment piece made it much more difficult for plaintiffs to prevail on a predatory pricing claim. A 2000 law journal article by commentator Patrick Bolton called *Predatory Pricing: Strategic Theory and Legal Policy* indicated that, since the 1993 decision was issued, no predatory pricing plaintiff has prevailed on the merits of his/her case in the federal courts.

After losing in the circuit court, *The Freeman* went to the Court of Appeals which, as noted, asked the Supreme Court to take the case directly. The Supreme Court will clarify how predatory pricing claims should be evaluated and will determine whether the 1993 U.S. Supreme Court decision, with its additional requirement of a recoupment showing, should be adopted as law in Wisconsin.

[2] A 1993 decision of the U.S. Supreme Court set out what needs to be proven in order to bring a successful predatory pricing case. This decision, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, has come under increased criticism for making it more difficult to prevail on a predatory pricing claim.